Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-2040

RICHARD F. PACILEO, SHERIFF,

Petitioner,

v.

JAMES DEAN WALKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

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No.

RICHARD F. PACILEO, SHERIFF,
Petitioner,

v.

JAMES DEAN WALKER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, the Sheriff of El Dorado County, California, prays that a writ of certiorari issue to review the judgment or decree of the Supreme Court of the State of California entered on April 9, 1980, in the matter of James Dean Walker on Habeas Corpus.

OPINION BELOW

The judgment or decree of the

Supreme Court of the State of California, staying the extradition of James Dean Walker pending a hearing to decide the petition for writ of habeas corpus on its merits, is set out in Appendix A. It is an unreported judgment or decree which is nevertheless final as to the issues presented herein. The order denying a rehearing is set out in Appendix B.

JURISDICTION

The judgment or decree of the Supreme Court of the State of California was filed on April 9, 1980. Under California law, that order is final as to the issues raised in this petition. (See Atlantic Richfield Co. v. Superior Court (1975) 51 Cal.App.3d 168, 170; 124 Cal.Rptr. 63; Yoakum v. Small Claims Court (1975) 53 Cal.App.3d 398; 125 Cal. Rptr. 882; Lang v. Superior Court (1975) 53 Cal.App.3d 852; 126 Cal.Rptr. 122.) A

timely application for rehearing was denied on April 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 22 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Whether in the context of an interstate extradition proceeding, the courts of the "asylum" or "sending" state have jurisdiction to conduct an evidentiary hearing on habeas corpus to determine the merits of a fugitive's allegation that the prison in which the demanding state may incarcerate him is not presently being operated in conformance with the Eighth Amendment of the United States Constitution.

STATUTES INVOLVED

The Constitutional and statutory provisions involved are set forth in

Appendix C. They are:

United States Constitution, article IV, section 2, clause 2;

Title 18, section 3182 of the United States Code;

California Penal Code sections 1548.1 and 1548.2.

STATEMENT OF THE CASE

On December 11, 1979, the Governor of Arkansas executed a requisition for the arrest and rendition of James Dean Walker, who was then within the State of California and was alleged to be a fugitive from justice. The Governor of Arkansas submitted proof that on December 6, 1965, after being convicted of murder in the first degree, James Dean Walker was sentenced to the Arkansas State Penitentiary "for the remainder of his natural life." Walker was received by the Arkansas Department of Corrections on or

about December 14, 1965. On or about April 4, 1975, Walker escaped from the custody of the Department of Corrections. By information number 75-18, filed on or about April 11, 1975, the prosecuting attorney for Lincoln County, Arkansas, charged Walker with the crime of escape, and a bench warrant was issued for Walker's arrest.

On February 13, 1980, the Governor of California honored the request of the Governor of Arkansas and duly issued a warrant of arrest and rendition. This warrant was then served upon James Dean Walker by the Sheriff of El Dorado County.

Thereafter, Mr. Walker challenged his custody under the California Governor's warrant by successively filing petitions for writ of habeas corpus in which he alleged that the Arkansas prisons to which he would be returned violated

the Eighth Amendment proscription against cruel and unusual punishment. On February 27, 1980, the Superior Court of El Dorado County denied Mr. Walker's first petition (Appendix D). On March 6, 1980, the Court of Appeal, Third Appellate District, denied Mr. Walker's second petition for writ of habeas corpus (Appendix E). On March 12, 1980, the United States District Court for the Eastern District of California denied Mr. Walker's third petition (Appendix F).

Mr. Walker then applied to the California Supreme Court for a writ of habeas corpus. On April 9, 1980, that court issued an order directing the El Dorado County Superior Court "to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United

States Constitution and thereafter decide the petition on its merits" (Appendix A). A timely petition for rehearing was denied on April 15, 1980 (Appendix B).

On April 21, 1980, upon the application of the petitioner herein, Justice Rehnquist issued an order temporarily staying the effect of the California Supreme Court's order of April 9. Justice Rehnquist ordered that a response to the application for stay be filed on or before April 28, 1980. On May 1, Justice Rehnquist continued the stay order pending the timely filing and disposition of a petition for writ of certiorari.

ARGUMENT

IN AN INTERSTATE EXTRADITION PROCEEDING, THE COURTS OF THE "ASYLUM" OR "SENDING" STATE LACK JURISDICTION TO REVIEW THE CONSTITUTIONALITY OF THE PRISONS IN THE DEMANDING STATE

The California Supreme Court has exceeded its jurisdiction and has violated article IV, section 2, clause 2 of the United States Constitution, as well as the implementing laws and interpretive decisions of this Court, by ordering that a hearing be held in a California Superior Court to determine whether the penitentiary in which the State of Arkansas intends to incarcerate James Dean Walker is currently operated in a manner which is consistent with the Eighth Amendment.

Article IV, section 2, clause 2 of the Constitution provides:

"A person charged in any State with treason, felony, or other crime, who

shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This provision has been implemented by the Congress in Title 18 of the United States Code, section 3182, and it has been supplemented by the states through the adoption of the Uniform Criminal Extradition Act. In California, the pertinent provisions are Penal Code sections 1548.1 and 1548.2.

The Extradition Clause of the Constitution and its supporting legislation have been interpreted frequently by this Court. Recently, in Michigan v. Doran (1978) 439 U.S. 282, the court stated:

"The Extradition Clause was intended to enable each state to bring

offenders to trial as swiftly as possible in the state where the alleged offense was committed. (Cit. omitted.) The purpose of the Clause was to preclude any state from becoming a santuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states. It articulated, in mandatory language, the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV. The Extradition Clause, like the Commerce Clause, served important national objectives of a newly developing country striving to foster national unity." (439 U.S. at pp. 287-288.)

The court went on to note that interstate extradition was intended to be a summary

executive proceeding in which the judiciary plays an extremely limited rule. Thus:

> "Once the governor has granted extradition, a court conside.ing release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." (439 U.S. at p. 289.)

In a previous decision which is entirely consistent with Michigan v. Doran, this Court held unequivocally that the courts of an "asylum" or "sending" state may not adjudicate the

constitutionality of the conditions of prisons in the demanding state. In Sweeney v. Woodall (1952) 344 U.S. 86, 89-90, the court held:

> "The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama [the demanding state] in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State." (footnotes omitted.)

The rationale of the Sweeney decision is particularly applicable to the present case. In Sweeney, this Court was not only concerned with preserving harmony between the states, but it also eschewed the concept that a prisoner who resorted to escape and who managed to cross a state line should be able to litigate constitutional claims about his imprisonment in a foreign court. This Court noted:

> "Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State." (344 U.S. at p. 89.)

In the present case, documents

provided by the Governor of Alabama demonstrate that Walker was received by the Arkansas Department of Corrections in December 1965, and that he escaped in 1973. During that time, inmates of the Arkansas prisons filed class action suits challenging the conditions of their confinement, and the federal courts have retained jurisdiction over those claims ever since. In chronological order, the reported decisions in these cases are Holt v. Sarver (E.D. Ark. 1969) 300 F.Supp. 825; Holt v. Sarver (E.D. Ark. 1970) 309 F.Supp. 362; Holt v. Sarver (8th Cir. 1971) 442 F.2d 304; Holt v. Hutto (E.D. Ark. 1973) 363 F.Supp. 194; Finney v. Arkansas Board of Corrections (8th Cir. 1974) 505 F.2d 194; Finney v. Hutto (E.D. Ark. 1976) 410 F.Supp. 251; Finney v. Hutto

(8th Cir. 1977) 548 F.2d 740; Hutto v. Finney (1978) 437 U.S. 678; and Finney v. Mabry (E.D. Ark. 1978) 458 F.Supp. 720. In the most recent decision, Finney v. Mabry, the court tentatively approved a settlement agreement authorizing the appointment of a Compliance Coordinator to monitor and report upon changing conditions in the Arkansas prisons. Inmates who did not resort to "self help" by escaping have relied upon the federal court in Arkansas to resolve their claims and are presumably bound by the recent settlement agreement. Therefore, in the present case there are even more compelling reasons than in Sweeney why Walker should be precluded from litigating his constitutional claims in the California courts. In this case, federal relief has been available and effective.

It is apparent that the order of

the California Supreme Court is inconsistent with Michigan v. Doran and Sweeney v. Woodall. Moreover, it is apparent that the California Supreme Court did not merely abuse its discretion by ordering a hearing in California on the constitutionality of Arkansas prisons. Decisions of this Court demonstrate that the Extradition Clause limits the jurisdiction of the courts in the "asylum" or "sending" state; it does not merely suggest guidelines for the exercise of judicial discretion.

Prior to the adoption of the Constitution, the rendition of fugitives from justice was governed by principles of comity between sovereign states. (Innes v. Tobin (1916) 240 U.S. 127, 130-131.) However, in some respects, including the interstate rendition of fugitives, the Constitution limited the sovereignty of the states and imposed

binding obligations upon them. (Nevada v. Hall (1979) 440 U.S. 410, 425; Commonwealth of Kentucky v. Dennison (1860) 24 How. 66, 100-103.)

This Court has stated that "[o]ne accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that." (Ponzi v. Fessenden (1922) 258 U.S. 254, 260.) This principle was recognized by the framers of the Extradition Clause and by the Congress when it provided a procedure for the prompt arrest and delivery of fugitives. (See Appleyard v. Massachusetts (1906) 203 U.S. 222, 226-228; Matter of Strauss (1905) 197 U.S. 324, 331, 333; compare Hyatt v. Corkran (1903) 188 U.S. 691.) (Extradition Clause does not apply to persons who are not fugitives.)

The procedure established by Congress incorporates certain prerequisites to lawful extradition. It must be shown that the person arrested is charged with a crime in the demanding state, that he is a fugitive from justice, and that a proper demand has been made for his extradition. (Pierce v. Creecy (1908) 210 U.S. 387, 401.) While a person arrested for extradition may always allege that these prerequisites have not been met (McNichols v. Pease (1907) 207 U.S. 100, 109; Roberts v. Reilly (1885) 116 U.S. 80, 94), this Court has consistently held that other matters may not be considered. (E.g. Michigan v. Doran, supra, 439 U.S. 282 (asylum state's courts may not review probable cause determination by demanding state); Hogan v. O'Neil (1921) 255 U.S. 52, 55 (sufficiency of evidence to support charge may not be reviewed in asylum

state); Biddinger v. Commissioner of Police (1917) 245 U.S. 128, 135 (defenses to the criminal charge may not be considered in the asylum state); Drew v. Thaw (1914) 235 U.S. 432, 439-440 (insanity at the time of the alleged offense may not be considered in the asylum state); Strassheim v. Daily (1911) 221 U.S. 280, 283, 286 (sufficiency of evidence to support criminal charge may not be considered in the asylum state); Marbles v. Creecy (1909) 215 U.S. 63, 69 (fear for life or claimed inability to receive fair trial may not be considered in the asylum state); Pierce v. Creecy, supra, 210 U.S. 387 (technical sufficiency of indictment may not be considered in the asylum state); Pearce v. Texas (1894) 155 U.S. 311 (constitutionality of the laws of the demanding state may not be adjudicated by the asylum state); Lascelles v. Georgia (1893) 148

U.S. 537, 544-545 (potential danger to the fugitive may not be considered in the asylum state); Commonwealth of Kentucky v. Dennison, supra, 24 How. 66 (nature of the crime charged is irrelevant).)

The cases noted above demonstrate the limitations on the jurisdiction of the courts in any "asylum" or "sending" state. The need for such limitations is as great today as it was when the Extradition Clause was adopted. Modern communication and transportation enhance both the likelihood of flight across state lines and the likelihood of the eventual apprehension of such fugitives. Increased transportation costs and economic pressures on governments have increased rather than diminished the need for mutual support among the states in the area of interstate extradition.

In the present case, the Governor

of the State of Arkansas has submitted a demand for the extradition of James Dean Walker, and has supplied proof that Walker was convictedin that state of murder in the first degree, was sentenced to prison for the remainder of his natural life, and is currently charged with escaping from the custody of the Arkansas Department of Corrections. The California Governor has honored that demand and has issued a warrant for the arrest and rendition of Mr. Walker. Walker has not denied that the extradition documents are in order, that he is charged with and convicted of crimes in Arkansas, that he is the person named in the request for extradition, or that he is a fugitive from justice. Therefore, he has presented no issue over which any court within the State of California has jurisdiction. Consequently, the order of the California

Supreme Court prohibiting execution of the Governor's warrant and directing that a hearing be held to test the constitutionality of Arkansas' prisons is in excess of the court's jurisdiction and must be set aside.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant application for writ of certiorari be granted.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Division

ARNOLD O. OVEROYE
Assistant Attorney General

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Deputy Attorney General

Attorneys for Petitioner

GWB:hb
6-17-80
80YS0003

APPENDIX A

Crim. No. 21422

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In Re Walker on Habeas Corpus.

Supreme Court
Filed
April 9, 1980
G. E. BISHEL, Clerk

_____
Deputy

The Sheriff of the County of El Dorado is ordered to show cause before the Superior Court of El Dorado County with directions to that court to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits.

The written return shall be served and filed on or before April 21, 1980.

Pending final determination of this proceeding execution of the Governor's Warrant of Extradition is stayed, and the Sheriff of the County of El Dorado is directed not to release petitioner into the custody of any agent of the State of Arkansas.

BIRD
Chief Justice

MOSK
Justice

MANUEL
Justice

NEWMAN
Justice

Justice

Justice

Justice

APPENDIX B

Crim. No. 21422

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In Re Walker On Habeas Corpus.

Petition for rehearing and for stay is denied.

Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

BIRD
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court, this 17th day of April A.D., 19 80

Clerk,

By J. Rossi
Deputy Clerk

APPENDIX C

UNITED STATES CONSTITUTION,
ARTICLE IV, Section 2, Clause 2

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

UNITED STATES CODE

18 U.S.C. § 3182

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive

authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of arrest, the prisoner may be discharged."

CALIFORNIA PENAL CODE

"§ 1548.1 Governor; duty to cause arrest and delivery

"Subject to the provisions of this chapter, the Constitution of the United States, and the laws of the United States, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State."

CALIFORNIA PENAL CODE

"§ 1548.2 Demand for extradition; form and contents; documents to accompany demand; charge of crime; authentication

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed

in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF EL DORADO

Date February 27, 1980 Court met at 9:00 a.m. Dept. No. 1

PRESENT:

Hon. CHAS. F. FOGERTY, Judge

Linda English, Reporter

June L. Wills, Deputy Clerk

John Roseberry, Bailiff

Title: In the Matter of the Application of ROBERT W. GEANDROT, Petitioner

(in Behald of JAMES DEAN WALKER) for the Writ of Habeas Corpus

---

Counsel: Appearing:

RONALD TEPPER, District Attorney, for The People

PAUL GERVAIS of Gervais & Geandrot for Petitioner

Nature of Proceedings Action No. 35142

PETITION FOR WRIT OF HABEAS CORPUS (From 2/21/80)

(cont'd.)

Petitioner present;

It is Ordered that the Writ applied for is denied on the basis of lack of jurisdiction to entertain the merits of the case.

It is further Ordered that the application for a Writ of Habeas Corpus or other like remedy in the Federal Courts, the petitioner shall be allowed until 3/10/80 to apply for said Writ or Writs and pending said date, it is Ordered that JAMES DEAN WALKER be retained in custody of respondent until further Order of the Court of competent jurisdiction.

cc: District Attorney
Gervais & Geandrot, P. O. Box 1356, South Lake Tahoe, Ca. 95705

APPENDIX E

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

3 Crim. 10729

In re

JAMES DEAN WALKER,

on Habeas Corpus

By the Court:

The petition for writ of habeas corpus is denied.

Dated: March 6, 1980.

PUGLIA, P. J.

F I L E D
MAR - 6 1980
Court of Appeal-Third District
Wilfried J. Kramer, Clerk

By_____Deputy

APPENDIX F

FILED
Mar 12, 1980
Clerk, U.S. District Court
Eastern District of California
By J. L.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---ooOoo----

JAMES DEAN WALKER, Petitioner, vs. RICHARD PACILEO, Sheriff, et al., Respondents.	)	CIVIL NO. S-80-164 LKK

MEMORANDUM

Petitioner, an inmate of El Dorado County Jail is proceeding with an application for a writ of habeas corpus, seeking to challenge his imminent extradition to the State of Arkansas, on the grounds that returning petitioner to

Arkansas would be returning him to a penal system which has been declared to be in violation of the Eighth Amendment's proscription against cruel and unusual punishment and that petitioner's life would be in jeopardy, not only because of the generally brutal conditions but also because he received threats from prison officials prior to his escape. Petitioner has also requested a stay of extradition pending the court's determination of the merits of petitioner's application. A hearing was held on the latter request on March 7, 1980, with petitioner represented by Robert Geandrot and Paul Gervais and with the State of Arkansas informally represented by Robert Jibson, Deputy Attorney General for the State of California.

After hearing argument in this case

and after reading and considering the application for a writ of habeas corpus, the exhibits, and the memorandum of points and authorities, this court denied the request for the stay. This memorandum is a memorialization of the decision rendered from the bench on March 7, 1980.

The court treated the request for a stay as one for a temporary restraining order or for a preliminary injunction. This being so, the court examined the petitioner's likelihood of success on the merits and the possible irreparable injury. Finding that there was little possibility that the court would reach the merits, however, this court denied the motion for a stay. See City of Anaheim v. Kleppe, 590 F.2d 285, 288 n.4 (9th Cir. 1978); Benda v.

Grand Lodge of Int'l Ass'n, 584 F.2d 308, 315 (9th Cir. 1978).

It seems unlikely that the court would ever reach a determination on the merits because it appears that petitioner has not exhausted his state remedies. His application shows that he sought a writ of habeas corpus from the El Dorado County Superior Court and that, when this was denied, with a stay of extradition granted to allow him to seek other review, he proceeded to the California District Court of Appeal, Third Appellate District. Counsel was informed by telephone that his application for a writ of habeas corpus had been denied by that court and that no stay was granted to allow him to seek further review. Petitioner did not present his application for a writ of

habeas corpus to the California Supreme Court; rather, he filed an application in this court on March 7, 1980.

The exhaustion of state remedies is a prerequisite to the consideration of each claim sought to be presented in federal habeas corpus proceedings. See Pitchess v. Davis, 421 U.S. 482 (1975); Picard v. Connor, 404 U.S. 270 (1971); 28 U.S.C. § 2254(b). State remedies have not been exhausted unless the petitioner's federal claims have been fairly presented to the state courts and the state's highest court has considered the claims on their merits. See Carothers v. Rhay, 594 F.2d 225 (9th Cir. 1979). This exhaustion requirement has been held to be applicable to interstate extradition proceedings. See Giles v. Merrill, 322 F.2d 786,

787 (10th Cir. 1963); Tickle v. Summers, 270 F.2d 848, 850 (4th Cir. 1959); Garrison v. Smith, 413 F.Supp. 747, 751 (N.D. Miss. 1976) Sutherland v. Love, 359 F.Supp. 983, 986 (E.D. Ark. 1973). Petitioner's allegations show that he has not applied to the California Supreme Court for a writ of habeas corpus and that, therefore, he has not exhausted state remedies.

Petitioner argues that the exhaustion requirement attaches only to applications for writs brought pursuant to 28 U.S.C. § 2254. This requirement does not apply, he contends, to writs sought under 28 U.S.C. § 2241(c)(1), which provides in part, that "the Writ of Habeas Corpus shall not extend to a prisoner unless he is in custody under or by color of the authority of the

United States...."[1/] Petitioner asserts that he is in custody by the color of

---

1/ 28 U.S.C. § 2241(c) provides:

The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or action of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nationa; or

(5) It is necessary to bring him into court to testify or for trial.

(continued)

the authority of the United States because it is the extradition clause of the United States Constitution, Art. IV, § 2, and the implementing federal statutes, see 18 U.S.C. § 3181 et seq., which provide the authority for the states to issue warrants of extradition.

Even if an application for a writ of habeas corpus challenging extradition is properly brought under 28 U.S.C. § 2441 rather than under 28 U.S.C. § 2254, a question that the court does not decide,

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Footnote 1 continued:

28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

the exhaustion requirement nevertheless applies. In Dye v. Johnson, 338 U.S. 864 (1949), the Supreme Court, in a per curiam opinion, reversed a decision of the Court of Appeals for the Third Circuit, which had held that the exhaustion requirement did not apply to a habeas proceeding challenging extradition, which had been brought pursuant to the predecessor statute to 28 U.S.C. § 2241. See Johnson v. Dye, 175 F.2d 250, 253 (3d Cir. 1949). As its basis for reversal, the Supreme Court cited Ex Parte Hawk, 321 U.S. 114 (1944), a case detailing the exhaustion requirement in habeas corpus proceedings. See also Garrison v. Smith, supra. No matter what the statutory basis for the instant petition, therefore, petitioner is required to exhaust his state remedies.

Petitioner also argues that if § 2254 is found to govern, subsection b of that statute controls the case and excuses his failure to exhaust state remedies. That provision states that state remedies need not be exhausted if there is an "absence of available state corrective process or existence of circumstances that render such process ineffective to protect the rights of petitioner." Petitioner contends that the extreme time pressure in this case renders the state proceedings ineffective to protect his rights. Because the District Court of Appeal, Third Appellate District, denied his application for a writ without a stay, petitioner asserts that he could not risk petitioning the California Supreme Court for fear that he would be extradited and thus lose his

remedy, should that court decline to grant a stay or the petition for a writ.

Petitioner cannot claim that the state remedies are ineffective since he has not sought to utilize them. See Fleming v. Klinger, 363 F.2d 378, 379 (9th Cir. 1966); Pate v. Wilson, 348 F.2d 900, 901 (9th Cir. 1965); Hudgins v. Circuit Court of Cheasapeake, 294 F. Supp. 258, 260 (E.D. Va. 1968). It is as possible that the state court would enter a stay of extradition or grant relief as it is that the state court would not grant a stay or the petition for a writ. Petitioner's fear that the latter possibility will come to pass does not render the state processes ineffective to protect his rights. See Fleming v. Klinger, supra. Thus, petitioner has not justified his failure

to exhaust state remedies.

The court is mindful that the exhaustion requirement is a matter of comity and is not a limitation on the power or jurisdiction of a district court to entertain an application for a writ of habeas corpus. See Picard v. Connor, supra, at 275; Harris v. Superior Court, 500 F.2d 1124, 1127 (9th Cir. 1974); cert. den., 420 U.S. 973 (1975). Comity requires that the orderly administration of justice in a state court is not to be interfered with, except in rare cases which present circumstances of peculiar urgency. See United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17 (1925); Macomber v. Gladden, 304 F.2d 487, 490 (9th Cir. 1962); Wisconsin Potowatomies v. Wilsey, 377 F.Supp. 1153, 1156 (M.D. Fla. 1974).

Federal courts should not exercise their power to consider a petition for a writ of habeas corpus except in "'cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with foreign nations.'" Id., quoting Ex Parte Royall, 117 U.S. 241 (1886) see also, United States ex rel. Kennedy v. Tyler, supra; Petition of Brabson, 167 F.Supp. 619, 621 (S.D.N.Y. 1958).[2/] Despite the seriousness of petitioner's allegations, it does not appear that the circumstances

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2/ Petitioner's reliance on Thomas v. Teets, 205 F.2d 236 (9th Cir. 1953), is misplaced. It is true that the Court of Appeals stayed Thomas' execution pending a decision on the merits of his application for a writ of habeas corpus, but in that case, consideration of the merits was proper because Thomas had exhausted his state remedies. Id. at 241.

of this case warrant the departure from the considerations of comity underlying the exhaustion requirement. In so deciding, the court notes that the state courts share the duty of protecting constitutional rights, see Stone v. Powell, 428 U.S. 465 (1976), so that despite the court's conviction that this is not a proper case for relaxation of the exhaustion requirement, petitioner is not left without a state forum in which to air his constitutional grievances.

This court's denial of petitioner's request for a stay of extradition is based largely on its evaluation that the merits of the application for the writ would never be reached because of petitioner's failure to exhaust his state remedies. However, it is also possible that the issues raised in petitioner's

application perhaps are not cognizable in a district court in the asylum state. See Price v. Pitchess, 556 F.2d 926, 928 (9th Cir.), cert. den., 434 U.S. 965 (1977); United States ex rel. Tucker v. Donovan, 321 F.2d 114, 116 (2d Cir. (1963), cert. den. sub nom. Tucker v. Kross, 375 U.S. 496 (1964); cf. Sweeney v. Woodall, 344 U.S. 86 (1953); Ross v. Middlebrooks, 188 F.2d 308 (9th Cir.); cert. den., 342 U.S. 862 (1951); United States ex rel. Little v. Ciuros, 452 F. Supp. 388 (S.D. N.Y. 1978). In such a situation a stay would not be proper.

A final consideration convinces the court that the issuance of a stay is not the proper course to follow. In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court, faced with defining the

limits of federal judicial intervention in pending state criminal cases, announced "the fundamental policy against federal interference with state criminal prosecutions." Id. at 46. Petitioner's request for a stay of extradition is a request that this court stop an already commenced state criminal proceeding. See United States ex rel. Frisbee v. Rapone, 449 F. Supp. 509, 510 (E.D. Pa. 1978).

Petitioner has alleged nothing that would remove his case from the operation of the policy of equitable restraint announced in Younger. He has made no showing that the state courts are inadequate or inhospitable forums for his claims, nor has he alleged that the current state court proceedings are being taken in bad faith or for purposes of

harassment. See Younger v. Harris, supra, at 53; Boyle v. Landry, 401 U.S. 77, 81 (1971). Thus, the policy of Younger suggests that a stay of extradition would be improper.

For the reasons stated above, IT IS THEREFORE ORDERED that petitioner's request for a stay of extradition is hereby denied.

DATED: March 12, 1980.

MILTON L. SCHWARTZ
UNITED STATES DISTRICT JUDGE